Military Operations and the Marine Environment

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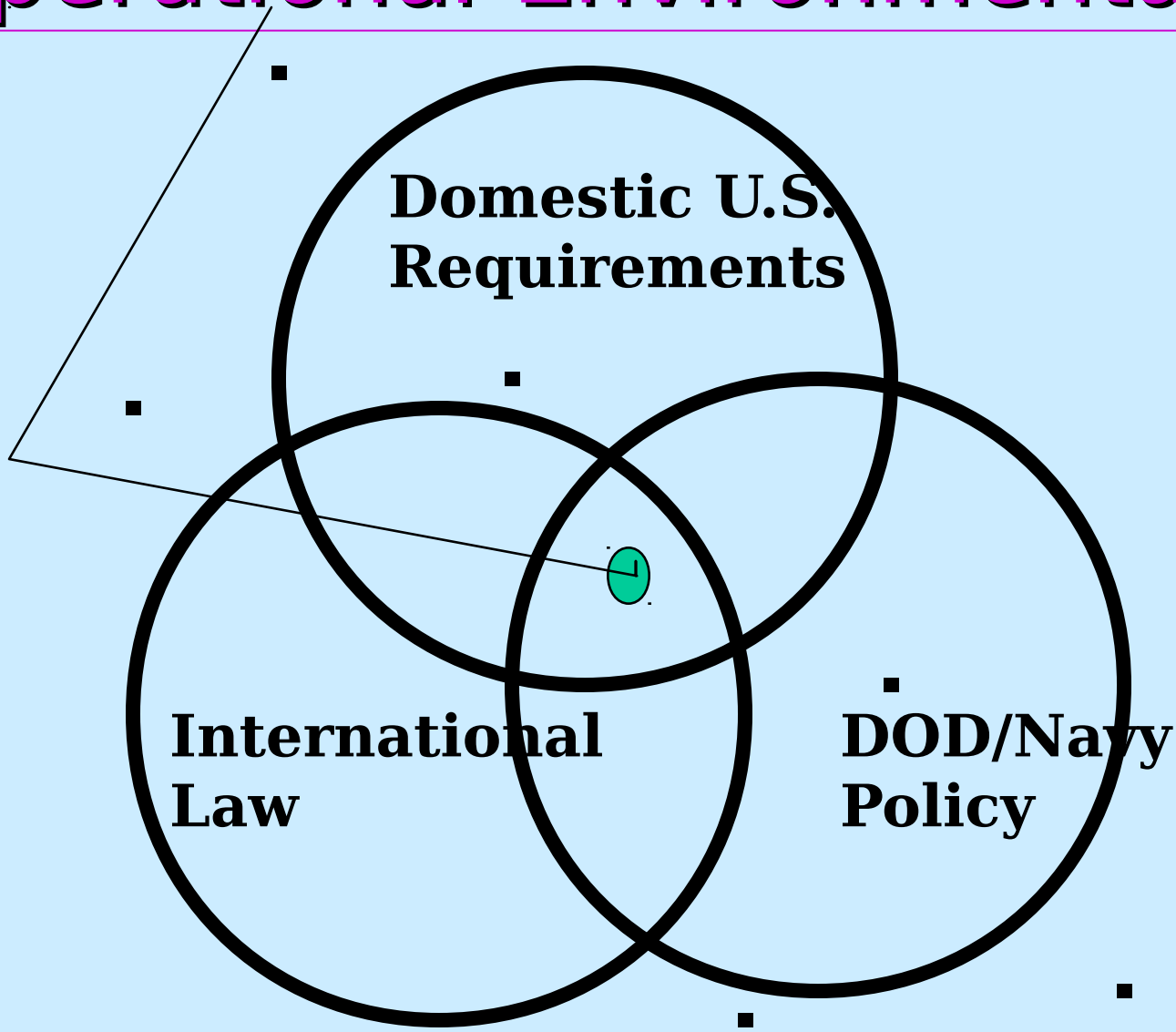
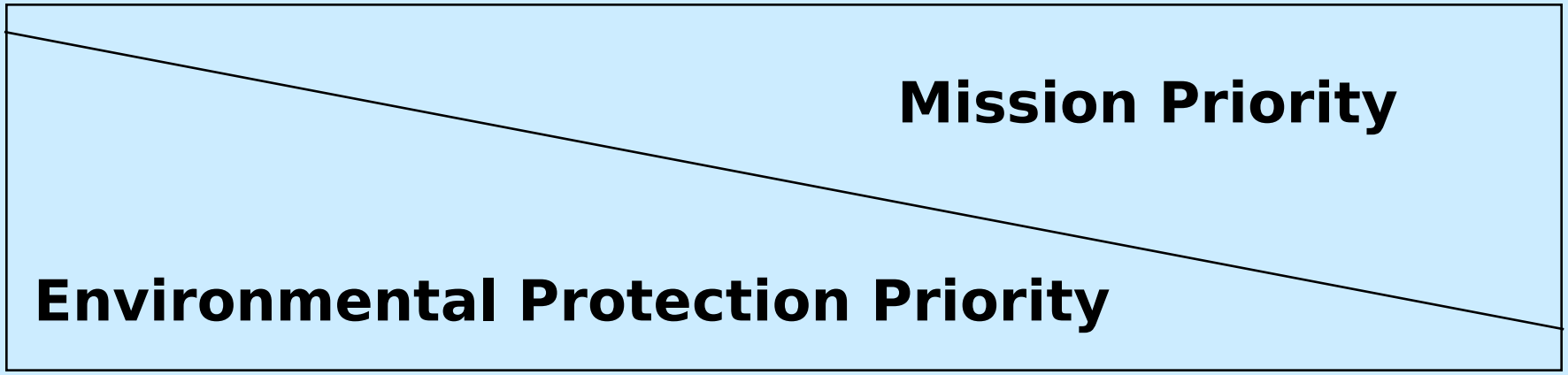
Operational-Environmental Law



The Sliding Scale Theory



Peace **MOOTW** **War**

“Defense and the environment are not an either/or proposition. To choose between
them is impossible in this real world of serious defense threats and genuine

Uniform National Discharge Standards UNDS (33 USCA 1322)

- Clean Water Act 312 - 1996 Amendment
- Incidental Discharges from Armed Forces Vessels
- Preempts States, unless no-discharge zone
- Joint Navy/EPA, consult w/States,USCG,NOAA
- Three-phased rule making
  - identify discharges
  - MPCD standards
  - design and use regulations
- Phase I completed, final rule published 10 May 99

Discharges Requiring MPCDs

- aqueous film-forming foam
- catapult water brake tank and post-launch retraction exhaust
- chain locker effluent
- clean and dirty ballast
- compensated fuel ballast
- controllable pitch propeller hydraulic fluid
- deck runoff and graywater
- distillation and reverse osmosis brine
- elevator pit effluent
- firemain systems
- gas turbine water wash
- Hull coating leachate
- motor gasoline compensating discharge
- non-oily machinery wastewater
- photographic laboratory drains
- seawater cooling overboard and welldeck discharges
- seawater piping biofouling prevention
- small boat engine wet exhaust
- sonar dome discharge
- bilgewater/oil-water separator discharge
- underwater ship husbandry

Discharges Exempted from Controls

- Boiler blowdown
- catapult wet accumulator discharge
- cathodic protection
- freshwater lay-up
- mine countermeasures equipment lubrication
- portable damage control drain pump discharge and wet exhaust
- refrigeration/air conditioning condensate
- rudder bearing lubrication
- steam condensate
- stern tube seals and under-water bearing lubrication
- submarine counter-measures set acoustic launcher
- submarine emergency diesel engine wet exhaust
- submarine outboard equipment grease and external hydraulics

UNDS Phase II ISSUES

- Began Mar 99, proposed rule Mar 01, final Dec 01
- MCPD Development - 7 legislative factors
  - nature, environmental effects, and practicability of controlling the discharge; effect on vessel capability; international standards; U.S. law; cost
- Enforcement by States and USCG
  - record-keeping and verification
  - modeled on marine sanitation device approach
- Consultations and concerns
  - ESA, EFH, CZMA, Tribes/Hawaiians, Reefs

MARINE PROTECTED AREAS
MPA Issues

- World Conservation Union (IUCN) Definition

"Any area of intertidal or subtidal terrain, together with its overlying
water and associated flora, fauna, historical and cultural features, which has been reserved by law or other effective means to protect part or all of the enclosed environment."

- 20 % "no-take" zones; networks and expansion; Wilderness areas; multiple types/uses; EEZ zoning
- Marine Sanctuaries (MPRSA 16 USC 1361, 1972)
  - Ongoing review of existing sanctuaries
  - Move in Congress to prevent new designations
  - Northwest Straits withdrawn as active candidate

CORAL REEF PROTECTION Executive Order 13089, 11 June 98

- Addresses Coral Reef Ecosystems, which includes natural resources associated with coral reefs
- Requires Federal Agencies to:
  - **identify actions that may affect reef systems**
  - **ensure actions do not degrade existing condition**
  - **use authorities to protect and enhance**
- Establishes Coral Reef Task Force (CRTF)
- Navy DOD rep on CRTF (mapping work group) and Executive Agent for all coral reef issues
- DOD Policy issued 3 Sep 97/OPNAV policy

include those species, habitats, and other natural resources associated with coral reefs within all federal, State, territorial or commonwealth waters

Coral Reef Task Force

- Chaired by DOI/NOAA
- Fed agencies, states/territories
- 3 plenary sessions/4th in D.C. 2 Mar
- Various working groups
- National Action Plan, Oversight Statement, Management Guide
- DOD Implementation Plan

DOD Guidance

- Any actions “likely to affect” U.S. coral reef ecosystems are subject to review in accordance with NEPA, E.O. 12114, and DOD policy
- Compliance approach:
  - forward need to include impacts analysis for coral reefs for all future actions and environmental planning reviews
  - identify existing actions in proximity to coral reefs
  - prepare an evaluation under NEPA for new/continuing actions where impacts identified
  - protect U.S. and International Coral Reefs

INVASIVE SPECIES

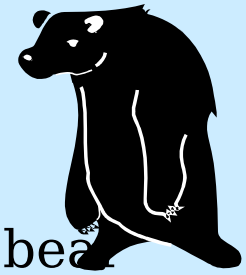
- Executive Order signed 3 Feb 1999
  - IS: Alien species whose introduction does or may cause harm to the economy, environment or human health
  - AS: Species not native to a particular ecosystem, including seeds, eggs, and spores
- Applies worldwide
- National Security exemption
- Ballast water exemption
- Invasive Species Council
  - DoD Management Plan

E.O. 13112-Invasive Species

- Problem: Invasive species change and disrupt the native ecosystem
- Fix: E.O. designed to control and prevent harms to economic, environmental, and human health
- Use programs and authorities to globally:
  - prevent introduction,
  - detect and control invasive species and
  - restore native species and habitat conditions

Marine Mammal Protection Act
16 USC 1361 (1972)

- Protects all species of marine mammals
  - morphologically adapted to marine environment e.g.,whales, dolphins, seals and sea otters
  - primarily inhabits marine environment; e.g., polar bear



- Overlap w/ ESA (e.g., large whales), but separate procedural requirements to protect same species
- Applies in U.S. territory and on high seas
- Administered by either NMFS or USFWS, depending on species in question
- No National Security Exemption

West Indian Sea Manatee: Coastal Florida

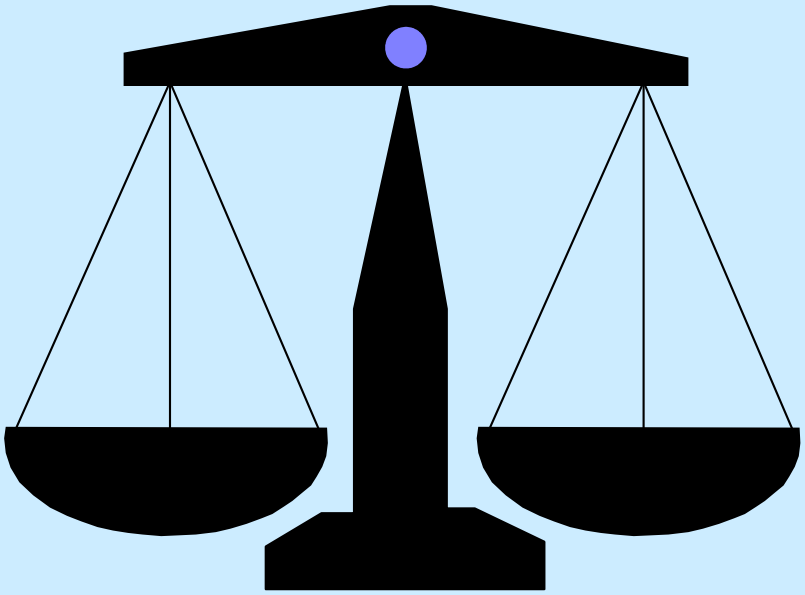
MMPA
Definition of Harassment

- Any act of pursuit, torment, or annoyance which
  - **(1) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A]**
  - **(2) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including but not limited to, migration, breathing, nursing, breeding, feeding or sheltering [Level B]**
- Has been interpreted to mean any disturbance, but see U.S. v. Hayashi, 5 F.3d 1278 (9th Cir. 1993)
  - **significant change in behavior; shooting over heads of porpoises to discourage eating tuna catch is not**

MMPA Prohibitions/Permissible Takings

- No “taking” without a permit or authorization
- Permit for research
- Authorization for incidental taking if stock not “depleted”
- LOA/IHA
  - Letter of Authorization 5 years; published rule
  - Incidental Harassment Authorization - 1 year
- Take broadly defined: “Harass, hunt, capture, or kill”
- Unlawful Taking - inadvertent or only if intentional/reckless; e.g., ship strikes?
- Enforcement
  - civil and criminal
  - citizen suits only under APA (for LOAs)

MMPA
Letter of Authorization



- Small take potential
- Specified activity in a specified region
- Requires regulation
  - notice and comment
  - applicant provides data
  - lengthy process
  - mitigation/litigation?
- Difficult to know when LOA is required

MMPA Developments

- 1994 Amendments
  - Defined harassment
    - Level A - injury
    - Level B - behavior
  - Permits/harassment authorizations
  - NOAA to complete stock assessments
  - Changed meaning?
    - **Limited caselaw**
- 1995 NMFS proposed rule for authorizations
- Noise from ship traffic and overflight used as example of harassment
- Included foreign EEZ
- Navy made extensive comments/rule on hold
- Current focus: Impacts of sound in the water

MMPA and Sound Potential Operational Impacts

- Acoustics
  - Active Sonars
- Low level air ops
  - Sonic Booms
- Vessel traffic
- Ranges
- NMFS guidelines for maximum levels of sound exposure

- Explosives
  - UNDEX
  - GUNEX
  - SINKEX
  - WASEX
  - Ship shock trials
  - Missile impacts
  - EER/Sonobuoy

The MMPA Problem Legislative Relief?

- Regulatory structure too rigid for military Ops
- Unclear guidelines for what constitutes harassment
- Scientific uncertainty - data gaps
- Need new approach to Level B harassment
  - prolonged disruption biologically significant behavior
  - impact on species/ecosystem, vice individual animal
- Up for reauthorization this year
- Goal
  - protection of the environment
  - maximum operational flexibility